APPENDIX
TABLE OF CONTENTS

	Page
APPENDIX A:	
Opinion (11th Cir. Sept. 29, 1999)	1a
APPENDIX B:	
Amended Judgment on Special Verdicts (S.D. Fla. July 30, 1997)	27a
APPENDIX C:	
Order Denying Defendants' Renewed Motion for Judgment As a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (S.D. Fla. July 21, 1997)	29a
APPENDIX D:	
Special Verdict Form As to Plaintiff BankAtlantic Financial Corporation (BFC) (S.D. Fla. Dec. 18, 1996)	31a
APPENDIX E:	
Special Verdict As to Plaintiff Alan Levan (S.D. Fla. Dec. 18, 1996)	34a
APPENDIX F:	
Instructions to the Jury (S.D. Fla. Dec. 18, 1996)	37a
APPENDIX G:	
Order Adopting Report and Recommendation (S.D. Fla. July 11, 1996)	54a
APPENDIX H:	
Report and Recommendation (S.D. Fla. Apr. 17, 1995)	58a
APPENDIX I:	
Constitutional Provisions Involved	73a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 97-5380

ALAN B. LEVAN, an individual plaintiff,
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs-Appellees-
Cross-Appellants,

v.

CAPITAL CITIES/ABC, INC., a New York corporation,
WILLIAM H. WILLSON, an individual,
Defendants-Appellants-
Cross-Appellees.

Sept. 29, 1999

Before TJOFLAT, BLACK and CARNES, Circuit Judges.

TJOFLAT, Circuit Judge:

Appellees BFC Financial Corporation ("BFC"),[1] and its President, Chief Executive Officer, and controlling shareholder, Alan Levan, brought this action for defama-

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[1] BFC's name has changed several times since its inception. We refer to BFC and its predecessors simply as "BFC."

tion against Capital Cities/ABC, Inc. ("ABC") and one of its producers, Bill Willson. Their cause of action arose from a segment aired on ABC's television program "20/20" that portrayed BFC and Levan as unfairly taking advantage of investors in real estate related limited partnerships, by inducing them to participate in transactions known as "rollups." Appellees claimed that in its broadcast ABC made numerous false or misleading statements with actual malice, and that ABC and Willson therefore were liable for injuries that appellees suffered as a result of the story. After the jury returned a verdict in favor of appellees, awarding them significant compensatory damages, ABC and Willson renewed their motion for judgment as a matter of law made at the close of evidence.[2] The district court denied their motion and entered judgment pursuant to the jury's verdict.

ABC and Willson appeal the district court's denial of their motion for judgment as a matter of law; appellees cross-appeal the district court's refusal to instruct the jury on their claim for punitive damages. We conclude that ABC and Willson are entitled to judgment as a matter of law. The evidence, taken as a whole, was insufficient to establish one of the elements of appellees' claim: that ABC and Willson broadcast the story with actual malice. We therefore vacate the district court's judgment in favor of appellees and instruct the district court to enter judgment for appellants. Given this disposition of the main appeal, we need not consider appellees' cross-appeal.

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[2] ABC and Willson also moved the court to grant them a new trial or alternatively a remittur. Because we conclude that the district court should have granted ABC and Willson judgment as a matter of law, we neither reach nor discuss the merits of their motion for a new trial or remittur.

I.

During the early 1980s, Alan Levan and his company, BFC, were engaged in the business of organizing and managing commercial real estate limited partnerships. The idea behind these partnerships was that small investors, who individually could not raise the millions of dollars needed to invest in commercial real estate, could invest small amounts of money in these limited partnerships (averaging between $5,000 to $20,000 dollars per investor) which would then pool the investors' money and purchase commercial properties. It was anticipated that the partnerships would hold onto the properties for a period of time ranging from between four to nine years and then sell the properties and distribute the proceeds among the investors. In each limited partnership, a wholly-owned subsidiary of BFC served as the managing general partner, and Alan Levan, as well as several other individuals associated with BFC, served as individual general partners.

In the mid-1980s, however, there was a severe nationwide decline in the value of real estate. The properties held by Levan's limited partnerships were no exception, and consequently, the value of the limited partners' interests plummeted. In response to this downturn in the real estate market, Levan and BFC offered their limited partners the two exchanges that are at the center of this dispute. The two transactions, which were completed in 1989 and 1991, respectively, were of a type referred to in the industry as a "rollup." In essence, each transaction was an exchange: the limited partners gave BFC their partnership interests (that is, their real estate interests and any other assets held by the partnership), and in return the limited partners received debentures issued by

BFC.[3] The two rollups were nearly identical in form; we therefore discuss only the 1989 transaction in detail.

The 1989 exchange involved three limited partnerships (the "1989 Partnerships"). At the time of the exchange, these partnerships held properties with an aggregate appraised value of $44 million.[4] The partnerships also held approximately $2 million in cash. Thus, BFC acquired a total of $46 million in assets from the 1989 Partnerships in the exchange.[5] In return, BFC gave the limited partners debentures that had a face value of $30 million. These debentures were unsecured and subordinated, which meant that if BFC went bankrupt, the debenture holders would be the last creditors in line to be paid from BFC's assets. The debentures were to mature in 20 years (July 1, 2009). Until maturity, the debentures were to bear in-

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[3] These exchanges, although widely characterized by industry experts as rollups, were different from the typical rollup transaction. In the typical rollup, the limited partners of several partnerships are offered the opportunity to merge their partnerships together, thereby creating a new entity—either a new limited partnership or a corporation—which assumes the rights and responsibilities of the original partnerships. If the limited partners approve the rollup, then they give up their original partnership interests in return for interests in the new partnership or shares in the new corporation. In the rollups offered by BFC, in contrast, the limited partners were given the opportunity to trade their partnership interests for debentures in the managing general partner, BFC.

[4] The actual appraised value of the properties was $77.6 million. The properties, however, were encumbered by a total of $33.6 million in debt. Thus, the $44 million figure represents the net appraised value of the real estate.

[5] The limited partners originally invested a combined total of $61 million in the 1989 Partnerships. As of September 30, 1988, the limited partners had received $18.4 million in distributions as a return on their original investment. The limited partners also gained substantial tax benefits as a result of their partnership interests.

terest (paid quarterly) at 8% for the first year, 9% for the second year, and 10% thereafter. If BFC's management determined that payment of interest during any quarter would "impair the operations of [BFC]," then BFC had the right to defer interest payments for that quarter. Deferred interest was due on maturity of the debentures; such interest would accrue interest at the current interest rate of the debentures until it was paid. Further, if BFC deferred interest for a total of eight quarters, then the interest on the debentures increased to 12% until maturity. After a one-month consent period, the limited partners approved the transaction by a two to one ratio.[6]

ABC began looking into the BFC rollups in the summer of 1990. Many other limited partnerships across the nation were engaging in rollup transactions at that time, and a large number of these transactions were criticized by experts (in real estate and financial matters) as being unfair to the limited partners. After ABC received a letter from one angry investor (who had participated in a rollup unrelated to the two that BFC consummated) com-

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[6] Although the 1991 exchange was structured almost identically to the 1989 exchange, the terms that BFC offered in the 1991 exchange were even more unfavorable to the limited partners. BFC offered the 1991 exchange to four limited partnerships, which had a combined original capital investment of $112 million. At the time of the exchange, the partnerships held properties with a total appraised value of $77 million. These properties were encumbered by mortgages totaling $46 million. The partnerships also had other net liabilities of approximately $500,000. In the exchange proposed by BFC, the limited partners were to give up these assets in return for a total of $17 million in unsecured subordinated debentures. These numbers reflect the total for all four partnerships; however, only three of the four approved the transaction. The three approving partnerships received 20-year debentures which mature on July 1, 2011. Until maturity, the debentures bear interest at 10.5% for the first year, 11.5% for the second year, and 12.5% thereafter. If BFC deferred interest payments for eight quarters, then the interest rate would increase to 13% until maturity.

plaining about these exchanges, it decided to investigate and air a story about rollups on its "20/20" news program. John Stossel, a 20/20 on-air-correspondent, and appellant Bill Willson, a producer, were assigned to work on the story. As its investigation unfolded, ABC decided to focus its story on the BFC rollups.

In the course of its investigation, ABC turned to a wide variety of sources, including congressional staff members, limited partnership experts, and securities analysts. ABC attended a hearing before the Securities and Exchange Commission, as well as numerous congressional hearings, including one hearing specifically dedicated to investigating the BFC rollups.[7] These sources almost uniformly criticized the rollups as being grossly unfair to the limited partners.[8]

First, ABC's expert sources criticized the value of the debentures that the limited partners received. Although BFC acquired $46 million in properties and cash from the 1989 Partnerships, it exchanged those assets for only $30 million in debentures.[9] The experts condemned this re-

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[7] Levan appeared at this hearing and testified in defense of the 1989 and 1991 transactions.

[8] Many of these experts were of the opinion that limited partners probably voted for the transactions because they did not read, or could not understand, the three-hundred-plus page prospectuses that disclosed the terms of the exchanges.

[9] BFC explained in its prospectus that this difference accounted for the following:

> [T]he uncertainties of the appraisal process . . . [,] because there is no assurance that the assets of the [partnerships] could ultimately be sold for [$46 million] . . . [, because] the appraised values do not take into account the costs to be incurred upon sale of the properties . . . [and because the appraised values are not] discounted in light of the fact that the sale of real properties to third parties typically involves a sale on terms pursuant to which a portion of the purchase

duction in the value of the limited partners' interest (which amounted to 34.7% of the net value of the partnerships' assets) as unjustified. Further, these experts pointed out, not only was the face value of the debentures too low, but the actual market value of the debentures was even lower. The market value of a debenture depends primarily on the market's perception of the financial stability of the issuing company—that is, the bonds are not highly valued if there is a significant risk that the issuer will not be able to pay the interest or the principal. In BFC's case, the market perceived BFC's debentures as a poor investment. During 1988 and 1989, BFC suffered losses of $4.4 million and $6.9 million, respectively. These losses were due to the weak financial condition of its primary asset, a savings and loan called BankAtlantic.[10]

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price is paid to the seller in installments or otherwise over a period of time.

BFC did include in the terms of the deal a method of compensating the limited partners in case it sold the properties that it gained in the exchange for more than $30 million. If BFC netted more than that amount (adjusted based on a complex formula that took various factors into account such as the cost of the real estate sales) from the sale of the properties, then BFC was required to pay the investors as "additional consideration" 100% of the amount over $30 million. BFC could pay this consideration in either cash or additional debentures. Although this feature of the transaction might appear to be favorable to the limited partners, ABC's objective expert sources thought it was extremely unlikely that BFC would be required to pay any additional consideration. BFC was desperately in need of cash when the rollup was consummated; thus, BFC anticipated that it would sell the properties as quickly as possible. Because BFC needed to sell the properties quickly, it most likely would be forced to sell the real estate at prices substantially below their appraised value. In fact, these experts turned out to be correct; BFC sold ten of the fourteen properties within two years of the exchange but paid no "additional consideration" to the limited partners.

[10] In 1989, BFC owned 53.4% of BankAtlantic, and the bank represented 98% of BFC's assets. BFC's interest in BankAtlantic grew to 70.1% by the time of ABC's broadcast in 1991.

Between 1988 and 1990, BankAtlantic sustained aggregate losses of $17.8 million. As a result of BFC's and BankAtlantic's financial woes, there was almost no market for the debentures.[11] When buyers could be found, the debentures traded for as low as 21% of their face value. Thus, the limited partners, who gave up $46 million in assets, ended up with debentures that had a market value of only about $6 million.

In light of the high risk that BFC would be unable to pay either the interest or the principle on the debentures, experts uniformly agreed that the debentures were "junk bonds"—in fact many experts characterized the debentures as worse than junk bonds. Junks bonds are bonds that have a high risk of nonpayment and therefore yield a high interest rate. Many experts opined to ABC that in light of BFC's shaky financial condition, the debentures should have carried a much higher rate of interest. The interest rate for the debentures issued in the 1989 transaction was 8% for the first year, 9% for the second year, and 10% thereafter. This rate was lower than the Prime Rate (the rate that banks charge to their most creditworthy customers), which was 11% on the day that BFC issued its prospectus for the 1989 transaction.[12]

When compared to what the limited partners received, namely, debentures that the market valued at about $6

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11 The debentures were not quoted on NASDAQ or listed on any exchange; to the extent that they were traded, they were sold on so-called "yellow sheets," which are wholesale quote sheets used by dealers.

12 We take judicial notice of the Prime Rate on February 14, 1989, the date on which BFC issued its prospectus. This figure was provided by the Federal Reserve Board, and cannot reasonably be disputed. *See* The Fed. Reserve Bd., *Federal Reserve Statistical Release* (visited Sept. 8, 1999) <http://www.bog.frb.fed.us/releases/H15/data/d/prime.txt>.

million, ABC's expert sources pointed out, BFC fared quite well in the 1989 exchange. Of the fourteen properties that BFC gained in the exchange, by 1991 BFC had sold ten of the properties for a net gain of $16 million. Thus, adding in the approximately $2 million in cash that BFC acquired from the partnerships, BFC gained $18 million in cash as well as the four remaining unsold properties.

The low value of the debentures was hardly the only criticism that the experts leveled at the transactions. A second criticism was that there were serious negative tax implications for the limited partners arising from the exchanges. For instance, some limited partners may have realized a taxable gain from the exchanges even though they received no cash distribution with which to pay the taxes. Further, although BFC had the right to defer interest payments on the debentures (and in fact did defer all interest payments after December 1991), the limited partners had to pay taxes each year on the deferred interest, as if it constituted ordinary income, even though they received no money to pay the taxes.[13]

A third criticism that the experts directed towards the exchanges was that an investor who voted against the transaction had no right (under the terms of the limited partnership agreements) to opt-out and receive the ap-

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13 The serious consequences of BFC's right to defer interest payments is demonstrated by what actually happened. As stated above, BFC deferred all interest payments on the debentures after December 1991. If BFC decided to continue deferring the payments until the bonds matured in 2009, the limited partners who participated in the 1989 exchange would be required to report as ordinary income (for federal income tax purposes) the deferred interest every year between 1992 and 2009. Thus, in 1992, for example, the limited partners were treating as ordinary income money they might not receive for eighteen years.

praised value of his interest.[14] Thus, investors, who bought into one of the 1989 Partnerships and anticipated that their investment would be returned in four to nine years, had no choice but to accept bonds that would not mature until 2009.[15]

Fourth, ABC's expert sources widely criticized the exchanges because of Levan's significant conflicts of interest. Levan was a general partner of each of the limited partnerships, President and controlling shareholder of BFC, and Chairman of BankAtlantic. Given that BFC was able to sell, within two years of the exchange, ten of the properties that it acquired from the 1989 Partnerships for $16 million, many experts questioned why Levan recommended the exchange to the limited partners rather than foregoing the exchange and selling the properties on behalf of the partnerships. That way, the limited partners would have ended up with $18 million in cash ($16 million from the sale of the properties and $2 million in cash), plus four properties, rather than debentures valued on the market at about $6 million.

A number of experts concluded that Levan devised the exchanges in order to infuse capital into BankAtlantic, BFC's cash-starved savings and loan. BankAtlantic sustained substantial net losses each year from 1988 to 1990, and by the end of 1990, it was unable to meet its capital requirements. Many experts told ABC that Levan's strategy to keep the bank afloat was to consummate the ex-

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[14] Congress later enacted legislation that prohibited rollup transactions that did not provide appraisal rights to dissenting investors. *See* Limited Partnership Rollup Reform Act of 1993, Pub.L. No. 103-202, § 303(a)(12)(A), 107 Stat. 2344, 2364 (1993).

[15] The lengthy period of time before the debentures matured would be particularly troubling to elderly investors who undoubtedly did not want to wait twenty years to get their money back.

changes, quickly sell the acquired real estate for cash, and infuse the proceeds into the bank. As evidence, these experts pointed to the fact that between 1989 and 1991 BFC infused a total of $9.4 million. Although BFC's investment enabled the bank to comply with its capital requirements by early 1991, the Director of the Office of Thrift Supervision, Department of the Treasury, testified before Congress that without the money that BFC put into the bank, it would not have met the capital requirements.[16] In the words of a congressional staff member who testified at the same hearing, "The rollups . . . apparently are intended to provide the means by which the bank and holding company will survive. In the conflict between Mr. Levan's fiduciary responsibilities . . . , the needs of the bank appear to have prevailed over his responsibility to the partnerships." *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. 8 (1991) (statement of Thomas C. Montgomery, minority counsel).

A fifth criticism that experts made was directed only towards the 1991 exchange. In that exchange, BFC discounted by 10% the appraised value of the real estate held by the partnerships. BFC explained (in its prospectus to the limited partners) that this discount was necessary in order to account for the costs and expenses it

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[16] The Director of the Office of Thrift Supervision was not alone in this opinion. Thomas Montgomery, minority counsel of the Committee on Energy and Commerce testified before Congress that the bank was dependent on BFC to meet its capital requirements, and that "[w]ithout the rollups, [BFC] would not have had the capital it needed to finance the bank." *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. 7 (1991).

would incur in selling the properties. ABC's expert sources viewed this discount as unfair because the costs that BFC incurred in selling the real estate it acquired in the 1989 transaction averaged only 2.5% of the appraised value of the property—nowhere near 10%.

Although the wide array of objective experts whom ABC contacted (or otherwise heard from through publications, Congressional testimony, or testimony before the SEC) uniformly condemned the rollups as unfair, these experts were not the only sources ABC used in composing its broadcast. ABC was present when Levan testified before Congress regarding the rollups and obtained a transcript of his testimony. It also had substantial interaction with BFC, and, specifically, with Levan himself. He provided information, documents, and videotapes, about the rollups.

The parties interaction included a five to six hour off-camera discussion between Willson and Levan.[17] ABC negotiated with Levan for months in order to obtain an on-camera interview with him that it could use in the broadcast. Such an interview never took place, however, because Levan and ABC could not agree on the ground rules for the interview; as a substitute, Levan sent ABC a videotape which he prepared and on which he answered specific questions about the rollups. ABC aired parts of this tape during its broadcast.

ABC broadcast its report on the BFC rollups, which it titled "Too Good to Be True," on November 29, 1991.[18] Although the broadcast expressly stated that the rollups

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[17] The parties disagree as to whether this discussion was on or off the record.

[18] ABC's 20/20 program is a one hour television show that airs weekly. ABC's story about the BFC rollups was one of three stories that aired on 20/20 that evening.

were legal, it was very critical of the fairness of the transactions to the limited partners.[19]

II.

In February 1992, Levan and BFC filed this lawsuit against Willson and ABC in the United States District of Southern District of Florida, alleging false light invasion of privacy[20] and defamation.[21] Levan and BFC alleged that ABC made a number of false statements or implications in the broadcast. The most damaging of these were that (1) ABC falsely implied that Levan had refused any contact with ABC, and, therefore, that he had something to hide; (2) in broadcasting parts of the

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[19] The broadcast revealed the terms of the transactions, and focused specifically on the low market value of the debentures. It also included, *inter alia*, interviews with limited partners who voted against the exchanges, and videotape excerpts of the congressional hearings on the BFC rollups.

[20] At trial, at the close the evidence, the district court dismissed the false light claim against both Willson and ABC. The court held that the false light and defamation claims were duplicative and thus not separately actionable under Florida law. The appellees have not challenged this ruling in their cross-appeal.

[21] Discovery ensued, but trial was delayed while ABC and Willson attempted to intervene as interested parties in a class action lawsuit of limited partners against Levan and BFC. This suit, *Purcell v. BankAtlantic Fin. Corp.*, 89-1284-CIV (S.D.Fla.), was a consolidation of three separate class action lawsuits brought by the limited partners who voted against the 1989 transaction. The plaintiffs alleged that Levan and BFC had violated federal securities laws and sought damages and rescission of the debentures. A jury found for the plaintiffs and awarded $8 million in damages. Before the case could be appealed, the parties reached a settlement whereby BFC and Levan agreed to pay the amount awarded by the jury and in exchange the parties agreed to vacate the judgment. In order to preserve the collateral estoppel effect on the present case, ABC filed a motion to intervene in *Purcell*, in effect to prevent the vacatur. That motion was denied, and this Court affirmed. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir.1996).

videotape Levan had sent ABC, ABC altered some of the lead-in questions and took some of Levan's statements out of context, thus creating false impressions about the rollup; and (3) ABC portrayed statements made by a member of Congress at a congressional hearing in such a way as to create false impressions about events at that hearing. The underlying allegation was that ABC had manipulated interviews and other footage to create the false impression that Levan had deliberately set out to defraud his investors.[22]

The case went to trial in late 1996. The trial lasted seven weeks. The jury found against ABC and Willson and awarded $1.25 million to BFC and $8.75 million to Levan in compensatory damages.[23] The district court de-

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22 On January 10, 1992, ABC broadcast three corrections to the report, which were read on the air by 20/20 anchorman Hugh Downs. First, ABC admitted that it had overstated the value of one of the real estate properties exchanged in the roll-up because ABC had not taken into account a substantial mortgage on the property. Second, ABC clarified its statement in the report that Levan "wouldn't talk to us." ABC admitted that, although the two sides could not agree on the ground rules for an on-camera interview, Levan had communicated with ABC in various ways, including sending it a videotape where Levan answered questions he thought ABC would ask. Finally, ABC admitted that its use of portions of this videotape may have mislead viewers: "Portions of that tape were aired, although our editing of that material may have lead some viewers to believe that money and property were transferred directly from a group of investors to Mr. Levan personally. Well, any such impression was inadvertent and erroneous and we're sorry if there was any misunderstanding of this kind." While these corrections may be relevant to the issue of damages, the fact that ABC made them does not constitute clear and convincing evidence ABC acted with actual malice at the time it broadcast its report.

23 In their complaint, Levan and BFC also sought punitive damages. At the close of appellants' case, the district court dismissed the claim for punitive damages on the ground that the appellants had produced insufficient evidence for a jury reasonably to con-

nied appellants' post-verdict renewed motion for judgment as a matter of law, or in the alternative for a new trial or remittur of damages. On appeal, ABC and Willson contend that the trial court erred in not granting their motion for judgment as a matter of law because, *inter alia*, Levan and BFC did not produce clear and convincing evidence of actual malice.[24] We agree.

III.

Because this case involves a public figure plaintiff,[25] and the broadcast was a matter of public concern, Levan and BFC are required to prove not only that the statements alleged were defamatory and false, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77, 106

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clude that ABC and Willson had acted with the primary purpose of "ill will, hostility, and attempt to defame" as required under Florida law. Levan and BFC have challenged the court's ruling in their cross-appeal, arguing that the court erred in dismissing their claim for punitive damages. Because we direct that judgment be entered for appellants, we do not reach the cross-appeal.

[24] ABC and Willson contend that the district court committed other errors during the prosecution of the case. They contend that the district court erred in not admitting evidence of the jury verdict in *Purcell v. BankAtlantic Fin. Corp.*, 89-1284-CIV (S.D.Fla.) *see supra* n. 21, and surrounding publicity to mitigate any injury to reputation suffered by Levan and BFC. They also contend that the trial court erred in applying the appropriate burden of proof to the element of falsity and in refusing to hold that the broadcast as a whole was protected opinion. Finally, they contend that the jury's damages award was excessive and cannot be sustained as a matter of law. Because we find that judgment must be entered for ABC and Willson on the issue of actual malice, we do not reach these claims of error.

[25] The district court held prior to trial that Levan and BFC were public figures and thus (in addition to establishing by a preponderance of the evidence that the 20/20 story was false) had to prove by clear and convincing evidence that ABC and Willson acted with actual malice to recover. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Levan and BFC do not challenge the public figure finding on appeal.

S.Ct. 1558, 1563-64, 89 L.Ed.2d 783 (1986), but also that ABC acted with "actual malice," *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). A showing of actual malice may be made by showing that the defendant published the defamatory statement either "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280, 84 S.Ct. at 726. Actual malice requires more than a departure from reasonable standards of journalism; "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). A public figure is required to prove actual malice by clear and convincing evidence. *See Morgan v. Tice*, 862 F.2d 1495, 1500 (11th Cir.1989) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974)).[26]

Our standard of review in libel cases in which the actual malice standard forms part of the jury charge is higher than in other cases. We are required to make an "independent examination of the entire record," *New York*

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[26] Neither the Supreme Court nor this Court have expressly decided whether the plaintiff must prove falsity by clear and convincing evidence or simply a preponderance. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n. 2, 109 S.Ct. 2678, 2682 n. 2, 105 L.Ed.2d 562 (1989). *But cf. Morgan*, 862 F.2d at 1500 (stating in dicta that both falsity and actual malice require clear and convincing proof). The Ninth Circuit, among others, has concluded that preponderance is sufficient. *See Rattray v. City of Nat'l City*, 51 F.3d 793, 801 (9th Cir.1994). Florida's model jury instructions for libel also require simple preponderance. *See In re Standard Jury Instructions*, 575 So.2d 194, 200 (Fla.1991). Because we find that there was not clear and convincing proof of actual malice at trial, we decline to address this issue.

Times, 376 U.S. at 285, 84 S.Ct. at 729, to determine whether the evidence offered at trial supports a finding of actual malice. There is, however, some confusion on how this review relates to factual findings made by the jury. The Supreme Court reiterated in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), that credibility determinations are reviewed under a clearly erroneous standard because of the jury's " 'opportunity to observe the demeanor of the witnesses,' " *id.* at 688, 109 S.Ct. at 2696, (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-500, 104 S.Ct. 1949, 1958-59, 80 L.Ed.2d 502 (1984)). Most courts show less deference when factfinding "rel[ies] on weighing of evidence and drawing of inferences." *Newton v. National Broad. Co.*, 930 F.2d 662, 671 (9th Cir.1990); *see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir.1998), *cert. denied*, —— U.S. ——, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999). *But see Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir.1997) (holding no special review is accorded to "preliminary factual issues"). In any event, a *de novo* review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice.[27] *See Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 (11th Cir.1992) (holding that the purpose of First Amendment independent review is "to guarantee that the jury imposed no greater burden [on the defendant] than the Constitution permits").

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[27] We recognize, therefore, that the law is unsettled as to the deference that we give to "facts" found by the jury. In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed: specifically, the overwhelming evidence that ABC had to support the broadcast's conclusion that the rollup was unfair to the limited partners.

Under Florida law, a statement is not defamatory unless the "gist" or "sting" of the statement is defamatory. *See Smith v. Cuban Am. Nat'l Found.*, 731 So.2d 702, 706 (Fla. 3d DCA 1999). The gist of any statement within a publication or broadcast is found only by reference to the entire context. *See Byrd v. Hustler Magazine Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed.2d 447 (1991). Our first job, therefore, is to determine the gist [28] or sting of the report.[29]

The parties have vehemently disagreed about the gist of the ABC report. Appellants argue that the gist was merely that the rollups were unfair, which the broadcast demonstrated by juxtaposing the undervalued debentures that

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[28] In using the term "gist," we do not mean to confuse the issue at hand. *Cf. Bressler v. Fortune Magazine*, 971 F.2d 1226, 1237 (6th Cir.1992) (Batchelder, J., dissenting). "Gist" is a term typically associated with the common law defense of substantial truth, the burden of which lies with the defendant. In a public figure libel action, the burden of proving that a statement is false lies with the plaintiff. The parties in this case agree that we must determine what the report, taken as whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice. We use "gist" as shorthand for this concept, although it might be more accurate, if somewhat clumsy, to ask what is the " 'effect on the mind of the reader.' " *Masson*, 501 U.S. at 517, 111 S.Ct. at 2433 (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980)).

[29] We recognize that the "gist" or "sting" of an alleged defamatory statement is a factual question. In this case, however, the gist of the report is intertwined with Levan's allegations of actual malice, which we must subject to independent review. *See Braun*, 968 F.2d at 1120-21. Unlike other factual findings, ascertaining the gist does not depend on resolving credibility issues, which are better left to the factfinder. *See Connaughton*, 491 U.S. at 688, 109 S.Ct. at 2696.

the limited partners received with Levan's financial success after the transactions were completed. Appellees, on the other hand, maintain that the gist of the broadcast was that Levan *knowingly* misled the limited partners into accepting the rollup transaction, thereby benefitting himself, BFC, and BankAtlantic.[30] This implication, appellees argue, follows from ABC's "hiding" theme: because the broadcast presented Levan as refusing to speak with ABC on camera, ABC implied that he had something to hide.

We conclude that the answer is somewhere in between: ABC clearly implied that the limited partners got a raw deal, one so bad that a viewer would believe Levan *must* have known that the deal was unfair to his limited partners, particularly in light of his financial expertise.[31] ABC on camera, ABC implied that he had something to apparent when viewing the report as a whole. ABC made numerous references to the devaluation of the debentures the investors received, including that they had lost around 80% of their face value. One of Levan's former business partners stated on camera that the trans-

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30 This gist is important to appellees' argument because much of their proffered evidence of actual malice consists of various statements by ABC employees that they believed that Levan thought the transaction *was* fair. If the gist of the broadcast was, as appellees contend, that Levan knowingly misled his investors, then these statements tend to demonstrate that appellants entertained serious doubs that the gist of their story was true.

31 Appellees point to a number of statements or images contained in the broadcast that, according to them, are false or misleading. Whether or not these statements or images convey a false message to the viewer, however, does not alter the gist of the story, which was that the deals were grossly unfair—so much so that Levan must have known they were unfair. *See Masson*, 501 U.S. at 517, 111 S.Ct. at 2433 (stating that minor inaccuracies do not affect the substantial truth of a publication).

action was done "only for the benefit" of Levan. The report acknowledged that Levan's prospectus disclosed both the particulars of the transaction and Levan's conflicts of interest, but it also depicted limited partners and a member of Congress stating that the prospectus was too long and complicated for an average investor to understand.[32]

Having ascertained the gist of the story, it is next incumbent upon us to determine, by making an independent review of the record, whether appellees established actual malice by clear and convincing evidence. We conclude that the proof was insufficient to show that ABC "entertained serious doubts" that the underlying thrust of the broadcast was true. As we have said, most of the evidence that related to actual malice was undisputed: the numerous experts ABC consulted, the views of the limited partners ABC interviewed, the testimony given at the Congressional hearing on Levan's rollup, and most importantly, the terms of the transaction itself.

In concluding that appellees failed to establish a case of actual malice, we have not overlooked the pieces of evidence that, appellees contend, demonstrated a reckless disregard by ABC for the truth of the broadcast. Most of this evidence consists of (1) statements made by Willson (to Levan or his attorney) in an attempt to

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32 On the other hand, Levan was not left out to dry; the broadcast acknowledged that the transaction was legal, and that the devaluation of the limited partnerships' real estate holdings was caused by a volatile market and changing tax laws, not Levan. Further, ABC showed Levan defending himself. ABC aired a tape of Levan answering this exact question: a voice-over asked if the deal was "fair," and Levan answered, "A majority of the partners voted to accept more risk for the possibility of greater return. I think they made the right decision."

secure an on-camera interview with Levan,[33] and (2) ABC's use of the videotape Levan provided in which he answered questions that Willson had informed him would be covered if Levan consented to a on-camera interview.[34] Taken as a whole this evidence pales in contrast to the numerous sources who told ABC that Levan had given the limited partners practically worthless junk bonds in return for valuable partnership assets, in violation of his fiduciary duty as general partner.

Before ABC broadcast its report, Willson and others spoke with numerous objective experts who uniformly

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[33] For example, Willson made a number of statements to Levan such as "I don't care about the truth," or "the truth is irrelevant to me." In response, Willson explained (before the jury) that he merely meant that it was not his job to broadcast the truth, but to provide both sides of a story and let the viewer decide which to accept.

[34] ABC eventually used the videotape in the broadcast, with a disclaimer that it had been provided by Levan. The videotape was made by a professional media consultant, using a list of questions Willson had provided Levan's attorney. Appellees' main evidence of actual malice was that, in the broadcast, ABC altered one of the questions; the question presented in the broadcast was slightly different from the one Levan answered. The question ABC posed to Levan asked whether he had conflicts of interest in the transaction. In the broadcast, ABC changed the question to, "[i]sn't keeping the real estate for [your]self a conflict of interest?" Although the question that ABC aired was different (and may have incorrectly implied that Levan, not BFC, owned the real estate after the rollup), it was only slightly so—the question, and the answer, was at heart about whether it was fair for Levan to be on both sides of the transaction. *See St. Surin v. Virgin Islands Daily News Inc.*, 21 F.3d 1309, 1316 (3d Cir.1994) ("Minor inaccuracies regarding factual information will not make an article untrue and libelous so long as the statement would not materially mislead the reader."); *Smith v. Cuban Am. Nat'l Found.*, 731 So.2d 702, 706 (Fla. 3d DCA 1999). The answer aired is the one Levan has always given—that there were conflicts of interest but that they were adequately disclosed in the prospectus given to the limited partners.

condemned the 1989 transaction as unfair, particularly in light of the low market value of the debentures. Spencer Jeffries, an expert on limited partnerships who testified at trial, wrote a lengthy report concluding that the debentures BFC issued were worth much less than their face value, and that the entire transaction was done to save the cash-poor BankAtlantic. During its investigation, ABC interviewed a limited partnership expert on-camera. In the interview, which was admitted at trial, the expert said that had he been one of appellee's limited partners, he would not have voted for the transaction. Willson testified that after the story was written but prior to the broadcast, ABC double-checked with numerous securities analysts to confirm the report's conclusion that the bonds were essentially "junk." All agreed that the bonds were junk; moreover, they said they would advise their clients not to buy the bonds. Stossel testified that he spoke with three other industry professionals to confirm that the bonds were worth much less than face value.

ABC also attended congressional hearings investigating rollup transactions, including one hearing that specifically investigated the BFC rollups.[35] *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. (1991). At least three Congressmen offered unfavorable opinions of the rollup. Two congressional staff members testified that the bonds had declined significantly in value and that the interests of the limited partners had been subordinated to the needs of

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35 Levan testified at the hearing and defended the rollups. ABC was unable to include his testimony in its broadcast because Levan invoked a congressional rule that permits a witness to insist that his testimony not be recorded by the media.

BFC and BankAtlantic. Thomas Ryan, the Director of the Office of Thrift Supervision, testified that BankAtlantic was a "troubled" institution, *id.* at 32, and James Doty, General Counsel of the Securities and Exchange Commission, testified that the bonds, being unsecured and speculative, were currently worth as low as 14.3% of the appraised value of the properties that BFC acquired in the 1989 exchange, *id.* at 66.

Finally, ABC had before it the terms of the 1989 and 1991 transactions, which a person even mildly familiar with investments would conclude were unfair to the limited partners.[36] In the 1989 transaction, the partnerships exchanged real estate appraised at $44 million and $2 million in cash for unsecured subordinated bonds with a face value of $30 million, not due for 20 years. Moreover, the terms of the deal allowed BFC to defer interest payments until the bonds matured. Given BFC's financial difficulties, the interest rate the debentures provided was far below the rate necessary to enable the bonds to trade near face value. The specified interest rate was so low that, by the time of ABC's broadcast, the market for the debentures had collapsed. The 1991 transaction was nearly identical in structure to the 1989 transaction but provided for an even greater "discount" in the exchange rate between the partnerships' assets and the debentures. Of course, permeating both transactions were Levan's substantial conflicts of interest: he was on both sides of the fence as a general partner on one side and a part-owner and officer of BFC and BankAtlantic on the other.

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[36] On cross-examination at trial, both Levan and his expert, Steven Goldstein, admitted that a reasonable investor might conclude that the roll-ups were unfair, even though that was not their personal view. Levan's counsel repeated this admission in his closing argument to the jury.

While ABC was investigating the rollups, Levan recommended that it interview Steven Goldstein, an expert in limited partnerships. Goldstein, who testified at trial, believed that the BFC rollups were fair, given the troubled real estate market and the consequent declining value of the limited partnerships' real estate assets. ABC did not interview Goldstein; this decision, according to appellees, evidenced actual malice on ABC's part. ABC also failed to interview on-camera any limited partner who voted in favor of the 1989 rollup. This, appellees contend, showed that ABC entertained serious doubts as to the unfairness of the transaction. Appellee's argument flows from the Supreme Court's decision in *Connaughton,* affirming a jury verdict for libel in part on evidence that a newspaper declined to interview a key witness. 491 U.S. at 692-93, 109 S.Ct. at 2698-99. But the salient facts in *Connaughton* presented a very different case.

In *Connaughton,* the newspaper used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe. *See id.* at 691-92, 109 S.Ct. at 2697-98. According to the source, the candidate had offered her and her sister a bribe (in the form of employment) during a conversation in his home at which five other people were present. Before it published the story, the newspaper spoke with the candidate, who had tape recorded the conversation, and the five other witnesses, all of whom squarely contradicted the source. The newspaper, however, neglected to listen to the tape recording, which the candidate made available. It also neglected to contact the source's sister, whom the source said would corroborate her version of the event. Under these facts, the Supreme Court held that the plaintiff had met his burden of establishing actual malice by clear and convincing evidence. *See id.* at 691-93, 109 S.Ct. at 2697-99.

The instant case is precisely the opposite of *Connaughton*. ABC had numerous sources telling it that the rollups were grossly unfair for the limited partners. *See Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Connaughton* on the ground that the article at issue was supported by the "overwhelming number of sources"). Given these sources, ABC was not required to continue its investigation until it found *somebody* who would stand up for Levan. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir.1992). The law only required that ABC not proceed to publication while entertaining "serious doubts" as to the truth of the broadcast. *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325.

ABC's choice not to include statements by limited partners voting for the transaction is similarly irrelevant. The decision to air the interview of one person but not another is at heart an editorial decision. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Newton v. National Broad. Co.*, 930 F.2d 662, 685-86 (9th Cir.1990). ABC did acknowledge in its report that a majority of investors voted for the rollup; it was not required, however, to make this point as strongly as Levan would have. We came to a similar conclusion in *Silvester v. American Broad. Co.*, 839 F.2d 1491 (11th Cir.1988), which also involved ABC and the program 20/20. During the broadcast, ABC opined that one of its sources was " 'a man with an axe to grind.' " *Id.* at 1498. The plaintiff claimed that this comment was insufficient; ABC should have informed its viewers that the source was unreliable. We disagreed, holding that ABC's comment was sufficient to alert viewers that the source "was not an unimpeachable source of information." *Id.*

It may be, as appellees contend, that there are meritorious reasons why a limited partner would have voted for the rollups. It may also be that Levan and his attorney presented some of these reasons to ABC in their off-camera meetings. Stossel implicitly acknowledged as much; the report ended with Stossel telling anchorman Hugh Downs that some investors had made money from limited partnerships but then asking rhetorically whether it was worth the risk. The conclusion that it may not have been worth the risk is "not something that could be easily proved or disproved by the testimony of one individual," *Perk*, 931 F.2d at 412, and "[d]ifference of opinion as to the truth of a matter . . . does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity or with a 'high degree of awareness of . . . probable falsity.'" *Connaughton*, 491 U.S. at 681, 109 S.Ct. at 2693 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964)).

In sum, the evidence in the record before us, when considered in the light most favorable to appellees, was insufficient to demonstrate the existence of actual malice by clear and convincing evidence. In view of the vast number of objective sources who condemned the rollups as unfair to the limited partners, we conclude as a matter of law that ABC did not entertain serious doubts that the gist of its broadcast was true.

IV.

For the foregoing reasons, we VACATE the district court's judgment in favor of BFC and Levan, and REMAND the case with the instruction that the district court enter judgment in favor of Willson and ABC.

SO ORDERED.

APPENDIX B

[Filed July 30, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation,

Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

AMENDED JUDGMENT ON SPECIAL VERDICTS

This action came on for trial before the Court and a jury, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

(1) that the Plaintiff, Alan B. Levan

(a) recover of the Defendant, American Broadcasting Companies, Inc., the sum of $8,250,000.00, with interest thereon at the rate of 5.45% as provided by law, and his costs of action;

(b) recover of the Defendant William H. Willson, the sum of $500,000.00 with interest thereon at the rate of 5.45% as provided by law, and his costs of action; and

(2) that the Plaintiff BankAtlantic Financial Corporation

(a) recover of the Defendant, American Broadcasting Companies, Inc., the sum of $1,000,000.00 with interest thereon at the rate of 5.45% as provided by law, and its costs of action;

(b) recover of the Defendant William H. Willson the sum of $250,000.00, with interest thereon at the rate of 5.45% as provided by law, and its costs of action;

(3) the Judgment on Special Verdicts entered December 18, 1996 (D.E. No. 612) is hereby vacated.

Clerk of the Court, Carlos Juenke

By: /s/ Anita Greer-Dixon
As Deputy Clerk
ANITA GREER-DIXON

APPENDIX C

[Filed July 21, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

ORDER DENYING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND DEFENDANTS' MOTION IN THE ALTERNATIVE FOR A NEW TRIAL OR REMITTITUR (D.E. #627)

THESE MATTERS are before the Court on Defendants', Capital Cities/ABC, Inc., and William H. Willson, Renewed Motion for Judgment as a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (D.E. #627). On July 16, 1997 at 10:30 a.m., the Court heard oral arguments on Defendants' Renewed Motion for Judgment as a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (D.E. #627). At the completion of that hearing, the Court, being fully informed of all relevant

issues and having had reviewed and researched Defendants' Motion/Reply and Plaintiffs' opposition thereto in conjunction with applicable law, announced a finding that there was evidence to support the verdict, and thereupon ruled from the bench. This order serves to memorialize that ruling. Accordingly, it is

ORDERED AND ADJUDGED that:

1) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Renewed Motion for Judgment as a Matter of Law (D.E. #627) is hereby *DENIED*;

2) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Motion in the Alternative For a New Trial (D.E. #627) is hereby *DENIED*;

3) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Motion in the Alternative For a Remittitur (D.E. #627) is hereby *DENIED*; Although this Court has previously closed this case, any motions that may still be pending are hereby *DENIED AS MOOT*.

DONE AND ORDERED in Miami, Florida, this 21st day of July, 1997.

/s/ C. Clyde Atkins
Senior United States District Judge

APPENDIX D

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

SPECIAL VERDICT FORM AS TO PLAINTIFF BANKATLANTIC FINANCIAL CORPORATION (BFC)

We, the jury, unanimously make findings of fact as a special verdict pursuant to Rule 49(a) of the Federal Rules of Civil Procedure in the form of answers to the following questions:

Question 1

Has Plaintiff BankAtlantic Financial Corporation proved by the greater weight of the evidence that the gist of the broadcast was false?

Yes ✔

No —

(If your answer to Question 1 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 1 is "Yes", proceed immediately to Question 2)

Question 2

If your answer to Question 1 is yes, has BankAtlantic Financial Corporation proved by clear and convincing evidence that ABC published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 2 is "No", proceed immediately to Question 4, *do not* answer question 3. If your answer to Question 2 is "Yes", proceed immediately to Question 3)

Question 3

If your answers to Questions 1 and 2 are yes, please set forth the amount of damages, if any, that ABC should pay BankAtlantic Financial Corporation for:

a. Past Compensatory Damages:
$1,000,000.00

b. Future Compensatory Damages (reduced to present value)——

$ ————————

(After answering Question 3, proceed immediately to Question 4)

Question 4

If your answer to Question 1 is yes, has BankAtlantic Financial Corporation proved by clear and convincing

evidence that Mr. Willson published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 4 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 4 is "Yes", proceed immediately to Question 5)

Question 5

If your answers to Questions 1 and 4 are yes, please set forth the amount of damages, if any, that Mr. Willson should pay BankAtlantic Financial Corporation for:

a. Past Compensatory Damages:
$250,000.00

b. Future Compensatory Damages (reduced to present value):

$ ————————

SO SAY WE ALL this 18th day of December, 1996.

/s/ Illegible
Foreperson

APPENDIX E

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

SPECIAL VERDICT FORM AS TO PLAINTIFF ALAN LEVAN

We, the jury, unanimously make findings of fact as a special verdict pursuant to Rule 49(a) of the Federal Rules of Civil Procedure in the form of answers to the following questions:

Question 1

Has Mr. Levan proved by the greater weight of the evidence that the gist of the broadcast was false?

Yes ✔

No —

(If your answer to Question 1 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 1 is "Yes", proceed immediately to Question 2)

Question 2

If your answer to Question 1 is yes, has Mr. Levan proved by clear and convincing evidence that ABC published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 2 is "No", proceed immediately to Question 4, *do not* answer question 3. If your answer to Question 2 is "Yes", proceed immediately to Question 3)

Question 3

If your answers to Questions 1 and 2 are yes, please set forth the amount damages, if any, that ABC should pay Mr. Levan for:

a. Past Compensatory Damages:
$8,250,000.00

b. Future Compensatory Damages (reduced to present value).
$ ————

(After answering Question 3, proceed immediately to Question 4)

Question 4

If your answer to Question 1 is yes, has Mr. Levan proved by clear and convincing evidence that Mr. Willson

published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 4 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 4 is "Yes", proceed immediately to Question 5)

Question 5

If your answers to Questions 1 and 4 are yes, please set forth the amount of damages, if any, that Mr. Willson should pay Mr. Levan for:

a. Past Compensatory Damages:
$500,000.00

b. Future Compensatory Damages (reduced to present value):

$ _____

SO SAY WE ALL this 18th day of December, 1996.

/s/ Illegible
Foreperson

APPENDIX F

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an indivdual,
and BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

INSTRUCTIONS TO THE JURY

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished you will go to the jury room and begin your discussions—what we call your deliberations.

These instructions will be in three parts. First, I will instruct you as to the general rules that define and control your duties. Second, I will instruct you as to the rules of law you must apply. In other words, I will explain to you what, Plaintiffs, BFC and Mr. Levan, must prove and by what standard before you can return a verdict for

them. And third, I will instruct you as to some rules for your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you must apply the law as I now give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you, and according to the law as I will explain it to you. You will recall that you took an oath promising to do so at the beginning of the case. Now it is your opportunity and obligation to do so.

In following my instructions, you must follow *all* of them, and not single out some and ignore others. They are all equally important. And you must not read into these instructions—or anything I may have said or done —any suggestion about what verdict you should return. That is a matter entirely for you to decide.

This is a action commenced by a corporation, BFC, and an individual, Mr. Levan, against a corporation, ABC, and an individual, Mr. Wilson. The fact that some of the parties in this case are corporations, is by itself, of no relevance to your considerations of this case. This case must be considered and decided by you as being among persons of equal standing in the community. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees which are made within the scope of their duties as employees of the company. A corporation is also responsible under the law for

information acquired by its employees within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence—that is, the testimony of the witnesses and the exhibits I have admitted in the record—but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantal evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, an ultimate conclusion.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls.

Now, in saying that you must *consider* all of the evidence, I do not mean that you must *accept* all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified

about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to it or him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties in the case. The testimony of the witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be

judged as to credibility, and weighted, and otherwise considered by the jury, in the same way as if the witness had been present, and had testified from the witness stand.

Moreover, during the course of the trial, the parties have introduced statements by third parties and such who have not been present in this Court. As you know, I have allowed some of that evidence to be admitted with a limiting instruction. I just want to remind you that that evidence was allowed to be introduced not to prove the matter being stated by those out of court individuals, but for the fact that the statement was made. Thus, you are not allowed to consider those statements, as I have reminded you before when the limiting instruction was given, for the truth of the matter being said.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field—one who is called an expert witness—is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Statements and arguments of counsel are not evidence in this case, unless made as an admission or stipulation of fact. When attorneys on both sides stipulate or agree as to the existence of a fact, however, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records and other documents which are in evidence in the case. However, such charts or summaries are not in and

of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or sumamries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts and figures shown by the evidence in the case, you are to disregard them entirely.

Any exhibits admitted in evidence during the trial will be available to you for reviewing during your deliberations. If an exhibit is received in evidence but is not fully read or shown to you at the time, do not be concerned because you will get to see and study it during your deliberations.

In this case it is the responsibility of the plaintiffs to prove, by certain standards of proof depending on the allegation made, every essential part of its or his respective claims. This is sometimes called the "burden of proof" or the "burden of persuasion." The defendants do not have to prove anything. For certain elements of plaintiffs' case, they must prove their assertions by the standard of proof entitled "Greater weight of the evidence," which is also known as a preponderance of the evidence. For other elements of the plaintiffs' case, they must prove their assertions by the standard of proof known as clear and convincing evidence. Later, I will inform you as to when each standard should be used, but for now, I will now define these different standards for you.

First, a "Greater weight of the evidence" or a "preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that the Plaintiff's claim is more likely true than not true.

The standard of "clear and convincing evidence" differs from the standard of preponderance of the evidence in that clear and convincing evidence is more compelling and persuasive. Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion and of such weight that it produces in you, the jury, a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

The word knew or "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistakes or accident.

In deciding whether any fact has been proved by either of the appropriate standards you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff's claim by the appropriate standard you should find for the Defendants as to that claim.

Now that you have heard all of the evidence and the arguments of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

In your deliberations, you are to consider the following cause of action for defamation. Originally, you were also to consider a cause of action by Plaintiff for False Light Invasion of Privacy. However, the false light claim is no longer at issue before you, and thus, you are only to consider Plaintiffs' cause of action for defamation. Plaintiffs, Alan B. Levan and BankAtlantic Financial Corporation (BFC), allege that Defendants, American Broadcast Companies, Inc., and William H. Willson, a producer of

the "20/20" news magazine, broadcast an investigative news report, on November 29, 1991 that contained false and defamatory statements and images about the plaintiffs. Defendants, Mr. Willson and ABC, deny Plaintiffs' allegations.

You will better understand the rules of law about which I am informing you if you keep in mind that this case involves two sets of values, both of which are important in our society. Under certain conditions, the law of Florida grants plaintiffs the right to recover damages for false, defamatory statements that injure their reputations.

On the other hand, the United States Constitution and the Florida Constitution guarantee freedom of speech to individuals and to the press. These constitutional guarantees entitle the press, which includes broadcasters, to publish critical statements about people, particularly people in public positions, and protects the press from liability for such statements, except if, under the standards I am about to describe, the statements are of such a nature and are made under such circumstances as to deprive the persons who make them of protection.

In this case, I have already determined that Mr. Levan and BFC are both public figures. The term "public figure" is a special term used by the law to describe persons who, by their own actions, have invited attention to and comment about themselves. The law affords the press protection in these circumstances, in order to avoid inhibiting comment and debate about people or companies in the public eye.

To recover for a false statement, public figures such as Plaintiffs, BFC and Mr. Levan, here must first, establish by a greater weight of the evidence that the gist of Defendants' broadcast was false. Then, Plaintiffs must prove by clear and convincing evidence that ABC and Mr. Willson

broadcasted the report knowing that it was false or having actual, serious doubts about its truth.

Although the plaintiffs' claims have been tried together, each is separate from the other. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

There are elements that each of the two plaintiffs must prove in order to prevail in this libel/defamation action. You may return a verdict for each of them only if you make all of the following findings:

—That the gist of the news report was false;

—That one or both of the defendants published a false news report about Mr. Levan and BFC knowing that it was false or having serious doubts about its truth; and

—That Mr. Levan and/or BFC was injured as a direct result of the broadcast of this news report.

I shall now define for you in more detail each of these elements.

The first question before you that you must decide is what was the gist—the core, the substance, the essential message—of the broadcast. The gist is really a summary of the heart of what the broadcast was about. In deciding what the gist of the broadcast was, you should consider the broadcast in its totality and assess it through the eyes of the average viewer. You should give the broadcast the meaning that the average viewer would give it.

In determining the gist of the broadcast, you are to consider statements of fact in the context of the entirety of the 20/20 broadcast, including, but not limited to, the

headlines and introductions, the verbal and written statements, the pictorial and video images, and such surrounding the broadcast.

Once you have determined the gist of the broadcast, then you may determine, whether or not the gist of the broadcast is false. In making this determination, if you find proof that the broadcast may have contained minor misstatements or inaccuracies, that is insufficient to prove falsity if the gist or substance of the broadcast, taken as a whole, is substantially true.

Moreover, in reaching your determination about whether the gist of the broadcast was true or false, you may not consider statements in the broadcast that you find to be pure opinion. Statements of pure opinion are those statements that are not capable of being proved true or false. Statements of fact and statements of opinion that imply false facts are, on the other hand, actionable. Therefore, you may consider them when you are determining whether the gist of the broadcast was true or false.

An actionable mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the Plaintiffs or their conduct that have not been stated in the broadcast or assumed to exist by the parties to the communication. However, this rule does not relieve the defendants from being subject to suit if the disclosed facts upon which an opinion is based are false, even though there is no suggestion or implication that the person is relying on undisclosed facts.

It is my duty as the judge in this case to decide which statements in the broadcast were statements of opinion and therefore removed from your consideration. I have found the following statements to be statements of opinion which, again, you may not consider in deciding whether the gist of the broadcast was false:

—"Roll-ups are kind of like kicking a guy when he's down" is a statement of opinion.

—The words spoken by Roy Henry in the broadcast that "He [referring to Mr. Levan] represents the worst roll up that I've ever seen." is an opinion.

—These words by John Stossel are also words of opinion: "It's something to think about the next time someone says "give me your money, we'll be partners.' "

Thus, concerning the gist of the broadcast, the issue for your determination on the defamation claim of Mr. Levan and BFC against defendants is:

Whether the gist of the broadcast concerning Mr. Levan and BFC was in some significant respect false statements of fact.

If the greater weight of the evidence does not support the claim of Mr. Levan or BFC that the gist of the broadcast was false then your verdict should be for ABC and Mr. Willson. "Greater weight of the evidence" means the more persuasive force and effect of the entire evidence in the case. However, if the greater weight of the evidence does support the claim of Mr. Levan or BFC on that issue, then you must determine defendants' state of mind when airing the broadcast.

You must next determine whether clear and convincing evidence shows that at the time the broadcast was aired, ABC or Mr. Willson knew the gist of the broadcast was false or had serious doubts as to its truth. The word knew or "knowingly," means that the act was done voluntarily and intentionally and not because of mistake or accident.

Again, "Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more

compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

If Plaintiffs do not prove by clear and convincing evidence that ABC and Mr. Willson knew at the time of the broadcast that the gist of the broadcast was false, or that they had serious doubts then as to its truth, your verdict should be for ABC and Mr. Willson.

However, if clear and convincing evidence does support Mr. Levan and BFC's claim on this issue, and the greater weight of the evidence supports Mr. Levan and BFC's claim on the other issues on which I have instructed you, then your verdict should be for Mr. Levan and BFC.

In deciding whether or not defendants knew at the time of the broadcast that the gist of the broadcast was false or had serious doubts as to its truth, you must determine both ABC and Mr. Willson's state of mind as to knowledge of falsity. The standard for determining Defendants', Mr. Willson and ABC, state of mind is a subjective one. Thus, the standard is *not* whether a reasonably prudent person would or should have had serious doubts about the truth of the broadcast or would or should have had a high degree of awareness that the gist of the broadcast was probably false. Rather, the question before you is whether one or both of these defendants *in fact* had such a state of mind.

Furthermore, keep in mind that the state of mind about which I am speaking refers to the state of mind of Mr. Willson and of ABC employees responsible for the content of the broadcast. What others may have thought, or what the average reasonable journalist may have thought,

or what *you* might have thought, is not the test. For you to render a verdict in favor of Mr. Levan or BFC or both of them, you must find that the evidence shows clearly and convincingly that Mr. Willson and/or other ABC employees with responsibility for what the report stated, broadcast the report knowing its gist was false or with serious doubts as to whether or not it was true.

Furthermore, Plaintiffs are entitled to prove Mr. Willson's and ABC's state of mind through circumstantial evidence, as I have defined before. Thus, in deliberating upon whether Mr. Levan and BFC have satisfied their burdens of proving knowledge of falsity or serious doubts as to truth on the part of the defendants with regard to the broadcast, you may consider all the evidence concerning the acts and conduct of ABC and its staff members that relate to the broadcast, including the acts of Mr. Willson.

Also, a principle to keep in mind in deciding the issue of whether defendants knew the statements were false or had serious doubts about as to its truth, is that your decision must turn upon the state of mind of ABC and its employees at the time of the broadcast.

On the issue of whether the broadcast was published with knowing falsity or serious doubts about its truth, you must examine the state of mind of each defendant concerning each plaintiff and you must answer the question separately for each defendant.

How do you answer that question for ABC, which is a corporation and does not have a state of mind? To determine this for ABC, you look at the beliefs of the persons whom ABC charged with responsibility for the content of the broadcast. If you find that any of them broadcast the news report knowing that its gist was false

or having serious doubts about its truth, then you may find that ABC did also. If none of them did so, then ABC did not do so, even though other ABC employees might have believed that the broadcast was false. You are not permitted to aggregate or add up the knowledge of all ABC employees in considering what ABC knew. ABC is answerable for the state of mind of only those persons to whom ABC gave responsibility for the content of the broadcast.

You must answer the question as to the state of mind of Mr. Willson separately. In order to find him liable, you must find that he personally proceeded with the broadcast despite knowing that its gist was false or despite having serious doubts about its truth.

You may find ABC liable by reason of the state of mind of Mr. Willson, because he is one of the employees of ABC who was responsible for the content of the broadcast. However, you may not find Mr. Willson liable only by reason of the state of mind of ABC. That is, if you find that ABC acted with knowing falsity or serious doubts as to truth solely because of the state of mind of a person or persons responsible for the content of the broadcast *other than* Mr. Willson, you may not find Mr. Willson liable on that ground alone.

If you find for ABC and Mr. Willson, you will not consider the matter of damages. But, if you find for Mr. Levan and/or BFC you should award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Mr. Levan and/or BFC for such loss, injury or damage as the greater weight of the evidence shows was caused by the broadcast complained of. A broadcast is a cause of loss, injury or damage if it directly and in natural and continuous se-

quence produces or contributes substantially to producing such loss, injury or damage. If you find for Mr. Levan and/or BFC, you shall consider the following elements of damage:

Any injury to reputation of Mr. Levan or BFC and any shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future by Mr. Levan. There is no exact standard for fixing the compensation to be awarded on account of such elements for damages. Any award should be fair and just in light of the evidence.

Additionally, you may award damages for any earnings lost in the past and any loss of ability to earn money in the future by BFC or Mr. Levan. For those future damages you choose to award, any amounts which you allow should be reduced to their present money value and only the present money value of such amounts should be included in your verdict. The present money value of future economic damages is the sum of the money needed now which, together with what the sum will earn in the future, will compensate Mr. Levan or BFC for these losses as they are actually experienced in future years. In making this determination, you should resort to your own common knowledge and arguments of counsel.

However, if you find for Mr. Levan and/or BFC, but find that no loss or damage has been proved, you may award nominal damages. Nominal damages are damages of an inconsequential amount, such as a dollar, awarded to vindicate a right where a wrong is established, but no damage is proved.

Of course, the fact that I have given you instructions concerning the issue of damages should not be interpreted in any way as an indication that I believe that Plaintiffs should, or shoud not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience. You will receive two separate verdict packests, one for each Plaintiff, and you must complete them both. Although some questions may be somewhat duplicated in each packet, it is imperative that you complete each verdict form in its entirity.

[Explain Verdict]

You will take the verdict forms to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict forms, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

You will be furnished a copy of these instructions for your use during your deliberations. You must consider these instructions as a whole and you are not to give undue weight to any one portion of these instructions.

As you were instructed previously, you have been permitted to take notes during the trial. Please remember, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of evidence. Also, you should not be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

If there are any among you who smokes, you will be permitted a ten-minute break each hour for that purpose. You are reminded that you are not to discuss the case until you return to the jury room and recommence your deliberations. The jurors who remain in the jury room may not discuss the case while the smokers are absent. If you wish to smoke, the marshal will escort you to the balcony, the designated smoking area, each hour on the hour.

APPENDIX G

[Filed July 11, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE is before the court on the Honorable Magistrate Judge William C. Turnoff's Report and Recommendation (R&R) (d.e. 319) on defendants' Motion for Summary Judgment (d.e. 68). In his R&R, the magistrate judge recommends that this Court deny defendants' motion. Defendants filed objections to the R&R, which objections have been fully briefed. On August 18, 1995, the court notified counsel that it would defer ruling on the R&R and underlying motion pending the resolution of appeals that may affect the outcome of the motion for summary judgment. On June 25, 1996, the Court of

Appeals for the Eleventh Circuit issued its opinion on these related appeals and this issue is now ripe for determination.

Upon carefully reviewing the entire record, the court is in agreement with the magistrate judge. Rather than reiterate what the magistrate judge has so fully and capably explained, the court will only address one point upon which defendants seems to rely heavily in formulating their objections. This point is the Supreme Court decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994). Defendants rely on this case throughout their objections in support of their position that this Court should give preclusive effect to the vacated judgment. This reliance, as the magistrate judge has already explained, is misplaced. The *Bancorp* decision speaks directly to the issue of "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari is granted." *Id.* at 388-89. In other words, the decision focuses solely on the propriety of vacatur after settlement and *not* the preclusive effect of the vacated judgment. In addressing this specific issue, the *Bancorp* Court held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 393. However, this is not a hard and fast rule. Vacatur will be allowed in exceptional circumstanes and

> [o]f course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

Id. However, both parties agree that this Court is in no position to review Judge Ryskamp's decision to vacate his judgment and, thus, the court cannot delve into the 'exceptional circumstances' analysis. Rather, the court must proceed under the assumption that the judgment was properly vacated.[1]

The only issue for this court is whether or not the vacated judgment has any binding or preclusive effect on these proceedings. The issue finds its answer in controlling Eleventh Circuit precedent. In this Circuit, a vacated judgment has no preclusive effect, *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur "divest[s] the lower court's earlier judgment of its binding effect"), even if the vacatur is entered pursuant to a settlement. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983) (holding that a judgment that had been vacated due to settlement has no preclusive effect). The non-binding cases defendants rely on to suggest otherwise do not change this established premise. As such, the court reaffirms its decision to adopt the magistrate judge's analysis and recommendation on this issue.

As for that portion of the R&R covering the Different Effects Test, the court agrees with the magistrate judge's analysis of the abridged transcript without offering an opinion on the accuracy of this unilaterally abridged transcript. As such, no further discussion by the court is necessary on this issue.

Therefore, upon careful consideration of the record and being fully advised of its premises, it is

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[1] Even assuming that the court could review Judge Ryskamp's decision, there is persuasive case law suggesting that a retroactive application of the *Bancorp* decision is not warranted. *See U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592 (Fed. Cir. 1995) and *Zeneca Ltd. v. Novopharm Ltd.*, 919 F. Supp. 193 (D. Md. 1996).

ORDERED AND ADJUDGED that the R&R (d.e. 319) is hereby *ADOPTED IN FULL* and made an Order of this Court. Further, defendants' June 19, 1995 Request for Oral Argument is hereby *DENIED*. Accordingly, it is

ORDERED AND ADJUDGED that defendants' Motion for Summary Judgment (d.e. 68) is hereby *DENIED*.

DONE AND ORDERED in Miami, Florida, this 10th day of July, 1996.

/s/ C. Clyde Atkins
Senior United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORP.,
a Florida Corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation
and WILLIAM H. WILLSON, an individual,
Defendants.

REPORT AND RECOMMENDATION

This Cause was referred to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Presently pending before the undersigned is Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL AND PROCEDURAL HISTORY

This defamation action was brought nearly three years ago by Plaintiffs BankAtlantic Financial Corporation ("BFC") and its President and Chief Executive Officer, Alan B. Levan. Plaintiffs' complaint alleges that a news report aired on the ABC News television program "20/20" was libelous and false. This broadcast reported on the controversy surrounding financial transactions

known as "roll-ups" and specifically featured certain roll-ups promoted and executed by Plaintiffs.

In Februray 1993, Defendants Capital Cities/ABC and William H. Willson moved for summary judgment. Defendants contended that dismissal was appropriate because Plaintiffs had failed to show that the overall gist of the broadcast was false, a threshold requirement in a defamation action.

On July 22, 1993, the undersigned issued a Report and Recommendation concerning the motion for summary judgment. (D.E. 203). The Report analyzed in detail the ABC broadcast at issue. That Report concluded that the "gist" of the broadcast was that the roll-up transactions promoted by Plaintiffs "were unfair to the limited partners, that Plaintiffs knew that they were unfair, and despite this knowledge, Plaintiffs counseled the limited partners otherwise." *Report and Recommendation* (D.E. 203) at 18. The undersigned found that the issue of whether the roll-ups were knowingly unfair had been previously determined in a prior action styled *Purcell v. Bank Atlantic Financial Corporation*, No. 89-1284-CIV-Ryskamp).[1] Based on this prior judgment, the undersigned recommended dismissing this action since the prior judgment conclusively established that the "gist" of the broadcast (that the roll-ups were knowingly unfair to the limited partners) was substantially true. Accordingly, the undersigned concluded that Plaintiffs were precluded from collaterally relitigating whether the roll-ups were unfair in this subsequent defamation action and thus recommended summary judgment.

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[1] In *Purcell*, Plaintiffs Alan Levan and BFC were found liable for securities fraud. The *Purcell* jury found that certain "roll-up" transactions which Levan and BFC had proposed to their limited partners were unfair and that Plaintiffs knew this when they recommended them. The *Purcell* case is discussed in detail in the July 22, 1993, Report and Recommendation (D.E. 203) at 16-18.

Subsequent to the issuance of that Report, several events have occurred that require the undersigned to reconsider its recommendation. First, in July 1993, Plaintiffs appealed the *Purcell* judgment to the Eleventh Circuit Court of Appeals. In February 1994, the Eleventh Circuit dismissed the *Purcell* appeal due to the lack of finality of judgment. Recognizing that this dismissal might have serious implications in this action, on March 21, 1994, District Judge C. Clyde Atkins issued an Omnibus Order in which he deferred ruling on the Report and Recommendation pending the outcome in *Purcell*. *Omnibus Order* (D.E. 264) at 2.

On April 1, 1994, Plaintiffs filed a status report advising the Court that the parties in *Purcell* had agreed to settle the case and had agreed in principal that the settlement would include a vacatur of the *Purcell* judgment. Consequently, on June 6, 1994, Judge Atkins entered an Order addressing the uncertainty surrounding the finality of the *Purcell* judgment. (D.E. 267). Noting that the judgment in *Purcell* "may no longer be final," Judge Atkins rejected that portion of the Report recommending summary judgment and referred the matter back to the undersigned for further consideration in light of the circumstances in *Purcell*. *Order on Report and Recommendation* (D.E. 267).

On September 12, 1994, the *Purcell* court entered a new Final Judgment which vacated its prior judgment and verdict. The new final judgment made the following findings:

> 1. As previously observed by this Court in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs.
>
> . . . .

> 3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. . . . In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.
>
> 5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

Based on these findings, the court ruled as follows:

> 4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

Final Judgment Approving Settlement and Order of Dismissal, (D.E. 282) Exhibit C. This vacatur calls into

question the preclusive effect of the original *Purcell* judgment. Thus, the undersigned must reexamine whether there still exist grounds for granting summary judgment. Oral argument on this issue was heard on February 8, 1995.

ANALYSIS

To begin, the undersigned notes that despite the language in the *Purcell* final judgment order stating otherwise, the determination of whether the *Purcell* verdict and judgment preclude this action rests with this Court alone. Case law dictates that courts do not have the power to decide the preclusive effect of their judgments in future litigation. The preclusive impact of a prior judgment is solely the province of the court in which the preclusion is being urged. *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 223 (1985); *Pettibone Corp. v. Easley,* 935 F.2d 120, 123 (7th Cir. 1991). Thus, the first task for the undersigned is to determine whether the vacated *Purcell* judgment has any preclusive effect in the instant case.

As indicated *supra,* the undersigned had previously found that the *Purcell* judgment did preclude further action in the instant case. Shortly after making this recommendation, the *Purcell* judgment on which the finding was based was vacated. Thus, the vacatur of the *Purcell* judgment no longer provides the undersigned with a certain judgment in which to ground collateral estoppel. Nonetheless, Defendants contend that the *Purcell* verdict and judgment are sufficiently final to support the application of collateral estoppel. A careful review of Defendants' position shows that their argument is unavailing.

Defendants admit that as a general matter if a judgment is vacated, the judgment will not be given preclusive effect. *See United States v. M.C.C. of Florida, Inc.,* 967

F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur divests the lower court's earlier judgment of its binding effect); *No East-West Hwy. Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel."); *Wolcott v. Ginsburg*, 697 F. Supp. 540, 543 (D.D.C. 1988) ("As a general matter a judgment which is vacated, for whatever reason, is deprived of its collateral effect, both as collateral estoppel and res judicata."). However, Defendants contend that the same result is not warranted in a situation where as here, a judgment has been vacated at the request of two private parties because they have settled after the entry of judgment.

Defendants cite several cases recognizing that judgments that are not final for all purposes may be sufficient for purposes of collateral estoppel so long as the issue in question was fully and fairly litigated and the decision that resulted was not tentative. *See e.g. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990) *cert. denied*, 500 U.S. 905 (1991) (defendants were collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior litigation was not concluded); *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) *cert. denied*, 475 U.S. 1095 (1986); *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-92 (5th Cir. 1982) *vacated and remanded on other grounds*, 460 U.S. 1013 (1983), *initial opinion adhered to on remand*, 718 F.2d 725 (5th Cir.), *cert. denied*, 460 U.S. 1013 (1983); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961) (holding that "finality" in the context of collateral estoppel may mean little more than

that the litigation of a particular issue has reached a stage that a court sees no good reason for permitting it to be relitigated). However, none of the cases Defendants cite address the situation here, where the court has vacated its prior judgment. Defendants fail to cite one case from this Circuit in which a vacated judgment has been given a preclusive effect.

Given the lack of case law on point, Defendants ask for equitable relief. Defendants contend that Plaintiffs' settlement of *Purcell* was little more than an attempt to buy off the estoppel effect of the *Purcell* judgment and verdict. Defendants argue that such manipulation of the judicial system warrants this court using its equitable powers to overlook the vacatur of the *Purcell* judgment. Indeed, several courts have expressed their concern with the possible injury done to the court's integrity in situations where deep-pocketed litigants offer lucrative settlement terms in return for a joint motion to vacate. *See e.g., Federal Deposit Insurance Corp. v. Mintz*, No. 92-6679-CIV-GONZALEZ (S.D. Fla. July 26, 1994); *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982). Defendants specifically point to the United States Supreme Court's recent decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, —— U.S. ——, 115 S.Ct. 386 (1994) as support for their contention.

In *U.S. Bancorp*, the Supreme Court addressed the question of whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after an appeal is filed. The Court expressed its disfavor for such practices and held that

judgments should be vacated only in exceptional circumstances and that "mootness by reason of settlement does not justify vacatur of a judgment under review". *Id.* at 393. Writing for a unanimous court, Justice Scalia explained that vacatur is an equitable remedy and as such must take into account the public interest. Scalia elaborated that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 392 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, —— U.S. ——, 114 S.Ct. 425 (1993) (STEVENS, J., dissenting).

While the Supreme Court's decision in *U.S. Bancorp* concerned only whether appellate courts should vacate judgments, lower courts have applied the principles set forth in *U.S. Bancorp* to both deny and grant vacatur at the district level. *See Espirito Santo Bank of Florida v. Kyriakides*, Nos. 89-16506-BKC-AJC, 90-0415, 1995 WL 75911 (Bankr. S.D. Fla. Feb. 6, 1995) (finding that "while the matter before this Court did not involve a judgment under review by an appellate court which has become moot, the principles and policies discussed in *U.S. Bancorp* regarding the treatment of motions to vacate judgments were applicable there); *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (applying the standards set forth in *U.S. Bancorp* to find that vacatur was appropriate and consistent with Supreme Court precedent). Defendants argue that this precedent combined with the "realities of the *Purcell* litigation" lead to the conclusion that the prior decision in *Purcell* should prevent this Court from relitigating the question of whether the roll-ups were knowingly unfair. However, no courts have stretched the reasoning in *U.S. Bancorp* to the

lengths to which Defendants now contend is appropriate. Defendants' contention that the undersigned may somehow look past the vacatur in *Purcell is* not supported by legal precedent nor does it take into account the practical result of such blind neglect.

The practical effect of Defendants' contention would have this Court make a preliminary finding that the *Purcell* court's decision to grant vacatur was unjustified, effectively overruling that court's decision. Neither the decision in *U.S. Bancorp,* nor other cited precedent, grants this Court such license. The factors enumerated by the Supreme Court in *U.S. Bancorp* were for the benefit of appellate (and by implication trial) courts to consider when determining whether *granting* vacatur in certain circumstances is proper. *U.S. Bancorp* does not begin to address what effect a judgment may have once vacated. Indeed, nothing in *U.S. Bancorp* or the other cases upon which Defendants rely gives a second district court the authority to determine that another trial court's decision to vacate was improvidently granted, thus allowing the second court to accept whichever judgment it believes to be the most equitable. Nor does the undersigned find that the facts of this case warrant such a leap in reasoning.

In the instant case, the presiding judge in *Purcell* considered the actions that occurred at trial and the surrounding circumstances and decided that vacatur of that action was proper. Although the trial judge in *Purcell* did not have the benefit of the reasoning of *Bancorp* to aid in his determination, it is not within the province of this Court to second-guess his decision to vacate. Thus, the undersigned must give the *Purcell* vacatur its full impact.

Although two other circuits have held that in limited circumstances a vacated judgement still may have a preclusive effect, *see Bates v. Union Oil Co.*, 944 F.2d 647, 649-50 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761

(1992); *Chemetron Corp.*, 682 F.2d at 1190-92; *see also Aetna Casualty and Surety Co. v. Jepperson*, 440 F.2d 394, 199-400, 403-05 (D. Nev. 1977), the Eleventh Circuit has held that a vacated judgment, even if due to settlement, has no precedential effect. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983). The undersigned does not find the facts in this case distinguishable from *Delta*.

Based on the foregoing, the undersigned finds that the vacated judgment in *Purcell* has no preclusive effect. Nothing determined in the *Purcell* action can prevent further litigation by the parties in this action. Although the Court must be ever vigilant in protecting itself from manipulation by deep-pocketed litigants who use their means to strategically avoid the effects of unfavorable rulings, the decision on whether to vacate a judgment ultimately rests with the presiding trial judge. Review of a trial court's decision to vacate falls solely within the jurisdictional province of the appellate court. Not even the broadest principles of equity allow a second trial court to assume appellate jurisdiction and "look past" a vacated judgment in order to choose a verdict that it believes to be more just.

Moreover, the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings. was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary made throughout the trial.[2]

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2 Defendants put great emphasis on the fact that the final judgment was drafted by Levan and BFC's counsel. Defendants state that "the judgment was signed in haec verba at the *Purcell* settle-

Thus, the undersigned believes that vacatur was proper even under the reasoning set forth in *U.S. Bancorp*.

Based on the foregoing, the vacated judgment in Purcell is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based on a judgment in a separate action which neither the parties to the prior litigation, nor the trial judge, believes is valid. Accordingly, Defendants' motion for summary judgment based on collateral estoppel grounds should be denied.

Different Effects Test

The Court's inquiry does not end here, because Defendants assert a second basis for granting summary judgment that was not addressed in the previous Report and Recommendation. Defendants assert that under what has become known as the "different effects" test, Plaintiffs have failed to show libel.

The "different effects" test was explained in the seminal case of *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962). In *McCormick* the court set fourth the general principles used to govern its analysis:

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ment hearing by the presiding judge who denied without comment or opinion ABC's motion to intervene to protest the vacatur, who didn't ask to hear ABC's objections to the consent judgment until after it was signed, who did not in any oral or written statement indicate that the interest of the public as a whole (let alone ABC) in the preservation of the original judgment had been taken into account." (D.E. 297). At best, Defendants imply that the presiding judge did not take into account several factors that case law suggests he should have before entering the vacatur. At its worst, Defendants argument implies that the presiding judge simply "rubber stamped" the consent judgment without proper consideration. While the undersigned acknowledges that the degree of scrutiny a consent judgment may receive often varies, the record here shows that the *Purcell* consent decree received careful scrutiny.

> It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that the mere inaccuracies, not affecting materially the purport of the article, are immaterial. . . A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Id. at 200 (citations omitted). To apply the different effects test the *McCormick* court eliminated from the articles the parts alleged to be false. The court then analyzed the edited articles and concluded that "the articles would not have produced a different effect, as the common mind would naturally understand them, than that which they produced with the alleged false parts included." Accordingly, the court held the articles were not libelous and dismissed the action. Courts since *McCormick* have consistently applied the "different effects" test to determine if an alleged libel was actionable. *See Nelson v. Associated Press*, 667 F. Supp. 1468 (S.D. Fla. 1987); *Hammond v. Times Publishing Co.*, 162 So.2d 681 (Fla. 2d DCA 1964); *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (Fla. 3d DCA 1970).

In the instant case, Plaintiffs' cause of action is sufficient to pass the "different effects" test. Plaintiffs' Complaint takes issue with several of the statements made in Defendants' broadcast. After deleting the challenged portions of the broadcast the viewer is left with a different impression than the original broadcast.

To summarize, the edited broadcast* begins by giving broad prefatory information explaining how in the 70's and 80's big financiers, such as Plaintiffs, marketed real estate investments to smaller investors through the use of limited partnerships. The broadcast tells viewers that the partnerships made money until a downturn in the real estate market reduced their value. The story states that as a result of the downturn, most small investors believed that they would have to sell their real estate at a loss, but were instead offered the alternative of roll-up transactions. The report then describes what happens in a typical roll-up transaction. At this point in the edited broadcast, Plaintiffs are barely mentioned.

The first substantial reference to Plaintiffs occurs in the following portion of the report when the Levan roll-up is used as an example of an investment gone sour. The report specifically points to the Levan transaction and explains that in that roll-up the limited partners were given bonds in exchange for real estate. The edited broadcast states that many investors were given bonds with a face value of less than they invested. The report continues by stating that some of that loss was expected and this loss wasn't Levan's fault, but that the problem with the bonds was that their real value depends on the health of Plaintiffs' savings and loan. The report then states that even though Plaintiffs' bank had made every interest payment thus far, the general belief that the bonds would not be paid off devalued the worth of the bonds to the point that they were considered "junk." Nothing in the broadcast to that point indicates that the transactions were inherently unfair or that Levan had any improper motives in issuing the bonds.

*** In their motion, Defendants' have set forth an "edited" broadcast script which deletes the "challenged" portions of the actual broadcast.**

The next part of the report quotes a financial planner who states that the roll-ups were done for the benefit of the general partners only and not for the benefit of the limited partners. The broadcast then explains that Levan could not force the limited partners to accept the roll-up, rather the transaction had to be approved by a majority vote of the limited partners. The broadcast then explains that the root of the problem with many roll-ups, including Plaintiffs', may well be that the prospectuses are no longer understandable to the average investor and that Congress is looking into that very problem.

The abridged broadcast then airs comments made by Alan Levan in which he states that the limited partners' vote in favor of the roll up was the right decision and that in 20 years he has never failed to meet a contract obligation.

The broadcast concludes with the statement that Alan Levan's roll-up is just one of many where the general partner seemingly has done better than the limited partners and how in general small investors get burned when they invest in something they do not understand.

After deleting the contested portions of the broadcast the viewer is left with the conclusion that in general roll-ups have not benefited the smaller investor and that Plaintiffs' roll-up was no exception. The abridged broadcast indicates that the reason for this is that generally these investors are overwhelmed by the length of prospectuses and the complexity of the transaction. In contrast to the original broadcast, the abridged version does not lead the average viewer to assume that plaintiffs knowingly tried to dupe the limited partners into accepting an unfair transaction. Thus, the gist of the original published version does not lead the common viewer to the same conclusion as does the abridged version. Accord-

ingly, Plaintiffs' Complaint passes the different effects test and summary judgment should not be granted.

Finally, the undersigned believes that the public interest dictates that the merits of this action be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding where there is a reason to believe that the better course would be to proceed to a full trial, summary judgment should be denied).

RECOMMENDATION

Based on the foregoing it is the recommendation of the undersigned that Defendants' *Motion for Summary Judgment* (D.E. 68) be DENIED. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

DONE AND ORDERED, in Chambers, at Miami, Florida, this 17 day of April, 1995.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
Chief United States
Magistrate Judge

APPENDIX I

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .